Supreme Court, U.S.
FILED
DEC 15 1995
CLERK

(2)

No. 95-600

In The

Supreme Court of the United States

October Term, 1995

JAY T. TINGLEY, *et al.*,

Petitioners,

vs.

WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Appellate District, Williams County, Ohio

RESPONDENT'S BRIEF IN OPPOSITION

MARTIN E. GOFF
Counsel of Record
BARAN, PIPER, TARKOWSKY, FITZGERALD & THEIS CO.,
Attorneys for Respondent
1515 Fifth Third Center
608 Madison Avenue
Toledo, Ohio 43604
(419) 241-2900

7940
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

12 pp

QUESTION FOR REVIEW

Where the Court of Appeals of Williams County, Ohio has thoroughly reviewed the record in this case and has determined that respondent did not act in an arbitrary and capricious manner, should this Court agree to review the case when the asserted errors consist of erroneous factual findings.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	2
Statement of the Case	2
Reasons for Denying the Writ	5
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Malinski v. New York, 324 U.S. 401 (1945)	7
Rochin v. California, 342 U.S. 1565, 96 L. Ed. 3d 1983, 72 Sup. Ct. 205 (1952)	5, 7

Statute Cited:

42 U.S.C. § 1983	2, 3, 8

No. 95-600

In The

Supreme Court of the United States

October Term, 1995

JAY T. TINGLEY, *et al.*,

Petitioners,

vs.

WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Appellate District, Williams County, Ohio

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondent, Williams County Department of Human Services, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Jay and Betty Tingley.

OPINIONS BELOW

The Sixth District Court of Appeals of Williams County, Ohio, reversed the trial court's denial of a Motion for Summary Judgment in favor of the Tingleys, rejecting Williams County's claims that its function of placing children for adoption is governmental in nature and therefore immune from tort liability. The court's Opinion is published at (1995) 100 Ohio App. 3d 385 and is reproduced in the Appendix to the Tingleys' Petition for Writ of Certiorari. (Appendix, pp. 17-29).

The appellate court also vacated the jury's award of damages to the Tingleys on their 42 U.S.C. § 1983 claim on the basis that there was no "competent credible evidence presented that appellees' right to due process was violated by appellant."

Following issuance of the appellate court decision, the Tingleys sought to invoke the jurisdiction of the Supreme Court of Ohio on the grounds that the case was one of great public or general interest and involved a substantial constitutional question. The Ohio Supreme Court declined to exercise jurisdiction in the case and was of the opinion that no substantial constitutional question was presented. The Ohio Supreme Court's Opinion is published at 72 Ohio St. 3d 1528 (1995) and is likewise reproduced in the Appendix to the Tingleys' Petition for Certiorari. (Appendix, p. 16).

STATEMENT OF THE CASE

This is essentially a negligence action filed by plaintiffs/appellants/petitioners Jay Tingley and Betty Tingley (hereinafter "Tingleys"), against defendant/appellee/respondent Williams County Department of Human Services (hereinafter "WCDHS"). The complaint and amended complaint sought recovery of a foster child who had been placed in the Tingleys' home and

damages arising out of that child's subsequent removal from their home. A 42 U.S.C. § 1983 action was also asserted by the Tingleys, as well as a claim for intentional infliction of emotional distress.

The Tingleys filed their original complaint in this matter in February, 1992. This complaint alleged that the WCDHS was the child placing agency in Williams County, Ohio and that the Tingleys were certified foster parents able to accept placement of foster children in their home. The complaint alleged that a foster child placed by the WCDHS was wrongfully removed from the Tingleys' home even though they had expressed an interest in adopting this foster child. This complaint sought unspecified damages and an injunction restraining the WCDHS from removing the child.

On April 9, 1992, responding to an order for a more definite statement, the Tingleys filed an amended complaint asserting negligence, intentional infliction of emotional distress and deprivation of constitutional rights under color of state law (42 U.S.C. § 1983). This amended complaint again sought return of the child and additionally $500,000 as and for damages allegedly sustained by the Tingleys.

On March 5, 1992, the trial court denied the Tingleys' claims for injunctive relief. The WCDHS filed its answer on May 15, 1992 generally denying the allegations of the amended complaint and asserting twenty-one (21) affirmative defenses. On July 29, 1992, the WCDHS filed its motion to dismiss based on lack of subject matter jurisdiction. This motion was granted by the trial court on September 30, 1992. The Tingleys appealed to the Sixth District Appellate Court in a timely fashion. The Appeals court affirmed the trial court's denial of the Tingleys' request for injunctive relief and remanded their tort claims back to the trial court for further proceedings. (*See Tingley v. Williams County*

Department of Human Services, C.A. Appeal No. 92 WM 000021 (1992)).

On November 17, 1993, counsel for the WCDHS took the depositions of both the Tingleys. WCDHS filed its motion for summary judgment on December 15, 1993. The matter proceeded to oral arguments on WCDHS' motion for summary judgment on February 17, 1994. The trial court denied the WCDHS' summary judgment motion on February 24, 1994.

Thereafter, the matter proceeded to a jury trial on March 9 and 10, 1994. The jury found for the Tingleys on Count I — negligence, and awarded $1,500, and Count III — the § 1983 action, and awarded $2,500. The jury returned a defense verdict on Count II — intentional infliction of emotional distress.

On March 24, 1994, the WCDHS filed motions for directed verdict, judgment notwithstanding the verdict and request for new trial. Same were summarily denied by the trial court on April 8, 1994. Thereafter, the WCDHS filed a timely notice of appeal and the matter came before the Sixth District Appellate Court on November 28, 1994 for oral argument. On January 20, 1995, the Court of Appeals reversed the trial court's decision regarding WCDHS' motion for summary judgment and vacated the jury verdicts and entered summary judgment in favor of the WCDHS.

On March 6, 1995, the Tingleys timely appealed to the Ohio Supreme Court with a Notice of Appeal and Memorandum in Support of Jurisdiction. WCDHS filed its Memorandum Opposing Jurisdiction on March 28, 1995. The Ohio Supreme Court dismissed the Tingleys' appeal on May 31, 1995.

On October 16, 1995, the Tingleys caused their Petition for Writ of Certiorari to be docketed with the Clerk of this Court. The matter now comes before this Court on the issue of the Tingleys' Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The argument advanced by petitioners in support of the Writ of Certiorari in essence boils down to a very simple proposition. Respondent acted arbitrarily and capriciously when it removed the foster child from their home even though they had expressed an interest in adopting the child. Further, petitioners rely on *Rochin v. California*, 342 U.S. 1565, 96 L. Ed. 3d 1983, 72 Sup. Ct. 205 (1952) and argue that the removal of the child by respondent was so "egregious and shocking" that it rises to the level of a denial of their substantive right to due process.

In a futile and misdirected attempt to confuse this Court, petitioners have failed to inform the Court of additional relevant factual testimony that, when considered, clearly supports the denial of the Petition for Writ of Certiorari.

The petitioners continue to argue, albeit erroneously, that respondent's published guidelines provided for a preference to foster parents who wished to adopt a child placed in their care. Actually, the written policy provided that no foster parent could adopt a ward in their charge unless certain published requirements were met. (Trial Transcript, p. 245, lines 12-16, Joint Trial Exhbit #3, p. 4, ¶ III, Eligibility Requirements). Respondent also had an unwritten policy that allowed foster parents to adopt a child in their foster care if the child had been in that home for at least twelve (12) months. (Trial Transcript, p. 276, lines 11-14). After respondent received permanent custody of the child, its written policy was changed to incorporate the above noted unwritten "twelve month" rule. (*See* Plaintiffs' Trial Exhibit #2, p. 5, subheading D, ¶ 1 and p. 6).

Respondent's foster parent program and adoption policy contained a grievance procedure for all participants who felt wronged by actions or inactions of the department. (Trial

Transcript, p. 304, lines 21-22). Petitioners were aware of this grievance procedure yet they made a conscious decision not to avail themselves of the procedure. (Trial Transcript, p. 76, lines 14-24).

The child in question was a "non-special needs" child. The parties stipulated to the State of Ohio's definition of "non-special needs" children. (*See* Stipulation No. 1, Trial Transcript, p. 36, lines 12-25 and p. 37, lines 1-5). Respondent's written adoption policy in effect during the time of the child's placement with petitioners provided that non-special needs children, ages 0-5 years, could *only* be adopted by families that had (1) a proven infertility, and (2) had less than one (1) natural or adopted child already in the home. Additionally, *all* adoption applicants, whether for special needs or non-special needs children, must have had a completed home study assessment on file with the agency. (Joint Trial Exhibit #3, p. 5, subheading IV, ¶s 1-2).

Both petitioners testified at trial that neither was infertile. (Trial Transcript, p. 168, line 13 and p. 190, lines 9-11). They also both testified that at the time, they had four (4) of their own natural and adoptive children living in their home. (Trial Transcript, p. 168, lines 9-25; p. 171, lines 2-8; and p. 190, lines 12-14). There was abundant testimony indicating that a completed home study was *not* on file with the agency at the time of their expressed interest in adopting the child. (Trial Transcript, p. 200, line 25; p. 201, lines 16-18; and p. 251, lines 17-19). Finally, it was undisputed that the child was five weeks old upon placement (Stipulation No. 5, Trial Transcript, p. 37, lines 16-18) and had been in the petitioners' home for less than twelve (12) months. (Stipulation No. 4, Trial Transcript, p. 37, lines 6-10).

The decision not to allow petitioners to adopt the child was based solely upon the fact that petitioners failed to meet the published criteria for adoption by foster parents of a non-special

needs child. There was no arbitrary or capricious conduct on the part of respondent. There was no denial of any substantive due process right. To equate respondent's behavior to that described in *Rochin* is simply misplaced and quite frankly, ludicrous. Indeed, petitioners had a right to be treated fairly and they were.

In *Rochin*, this Court found that the forced removal of evidence from the body cavity of the defendant was reprehensible and obnoxious and could not be used as a basis of Rochin's conviction. Again, the actions of respondent in this case are in no way as reprehensible as the conduct in *Rochin* and, accordingly, respondent's actions cannot be said to "offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples". *Malinski v. New York*, 324 U. S. 401 (1945) at 416-417.

As to petitioners' alternative argument that their situation is similar to a series of cases involving land use and zoning laws, it is submitted that no viable connection can be made between those cases cited by petitioners and the facts of this case. While it is true that *Brady, Littlefield* and *Bateson* involve substantive due process claims, those are all readily and easily distinguishable from the facts of the case *sub judice*.

Brady involved irrational zoning actions that were motivated by political animus. There is absolutely no evidence in the record of this case which even remotely suggests that respondent's actions were politically motivated. That argument has never been raised by petitioners.

Littlefield involved the placing of arbitrary conditions on the granting of a building permit. Again, there is absolutely no evidence in the record to support an argument that the respondent's published guidelines were arbitrary. Petitioners' argument is that the guidelines weren't followed, not that the

guidelines themselves were arbitrary. Again, that argument, too, has never been asserted by petitioners.

Finally, *Bateson* involved the denial of a building permit to an individual who met *all* requirements for the issuance of said permit. In this case, petitioners testified at trial that they did *not* meet all requirements necessary to adopt a non-special needs child.

In each of these cases, it appears there was clear, credible and competent evidence presented that supported the underlying findings of arbitrary and capricious conduct by the various governmental entities involved. In the case at bar, and as noted by the Sixth District Court of Appeals of Williams County, Ohio, the jury's award of damages on the petitioners' 42 U.S.C. § 1983 claim was vacated because of the complete lack of "competent and credible evidence" to support such a claim.

The fact is, respondent never ignored its own published guidelines concerning adoption by foster parents. As noted above, even if a preference was due petitioners, they still did not meet the mandatory criteria for adoption of a non-special needs child.

CONCLUSION

The Williams County Department of Human Services prays that this Court deny the Tingleys' Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and because the lower court's holdings were not in error.

Respectfully submitted,

MARTIN E. GOFF
Counsel of Record
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO.
Attorneys for Respondents
1515 Fifth Third Center
608 Madison Avenue
Toledo, Ohio 43604
(419) 241-2900